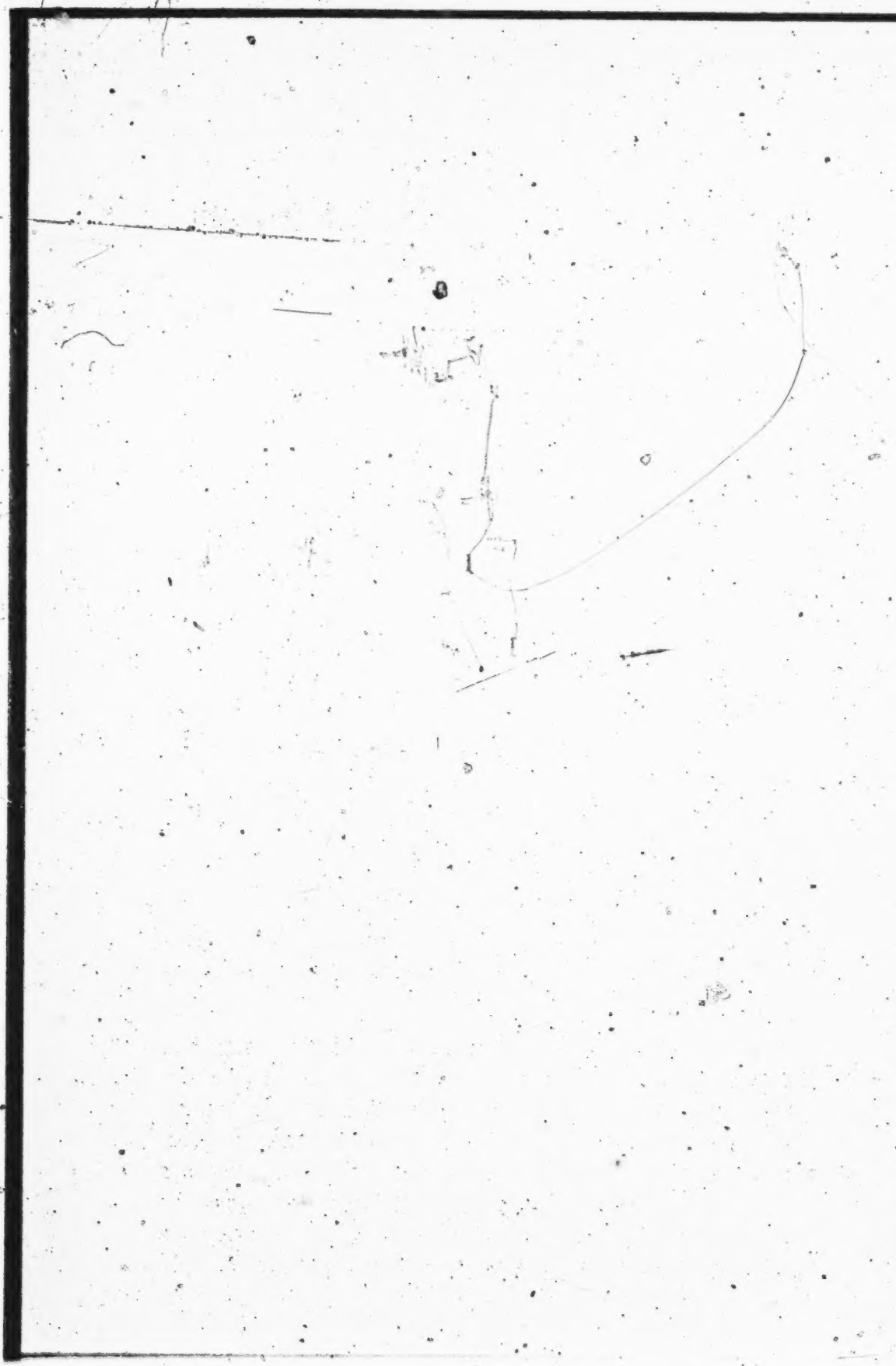

In the
Supreme Court of the United States

OCTOBER TERM, 1967

No. 555

GREYHOUND LINES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
MISSOURI, KANSAS AND OKLAHOMA COACH LINES,
A Corporation,

Appellees.

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division.

BRIEF OPPOSING MOTIONS TO AFFIRM

This brief opposes the motion to affirm of the United States and the Interstate Commerce Commission (Government), and the motion of Missouri, Kansas and Oklahoma Coach Lines (M. K. & O.).

Appellees express no disagreement with our statement of the question presented on page 2 of our jurisdictional statement. Appellees tacitly acknowledge that the Commission lacks power to compel institution of optional honoring arrangements initially; indeed, the Commission did not claim that power as a basis of its order. And appellees admit the correctness of the Commission decisions cited in pages 6 to 11 of our jurisdictional statement (Govt. p. 6; M. K. & O. p. 8).

ARGUMENT

Appellees present no reasons that warrant affirmance of the judgment below.

1. The Government (pp. 4-6) and M. K. & O. (p. 10) argue that since the Commission found that cancellation of optional honoring would affect the value of the service to the ticket holder, the Commission had power to prevent cancellation under its authority to regulate rates. That contention has no merit, and no authorities support it. In the Commission decisions which we cite (J. S. pp. 6-11), and which appellees do not challenge, the Commission held for more than fifty years, and until the case at bar, that it was powerless to prevent cancellation of a joint traffic arrangement that it could not initially compel, *even though the effect of that cancellation was the imposition of higher rates on shippers.* The general principle was stated as follows in *Port of New York Authority* v. *A. T. & S. F. Ry. Co.*, 144 I. C. C. 514, 517 (1928):

> "In numerous cases we have permitted carriers to cancel joint rates or restrict routing, which had the effect of leaving higher combination rates to apply over certain routes, when it appeared that they did so in order to safeguard their long haul. We have done this on the principle that we have no power to prevent the cancellation of a through route if we could not have established the route as an original proposition."

In *Restrictions, Riss & Co., And Eliminations, Hi-Way Motor,* 46 M. C. C. 290 (1946), the Commission held that it had no power under § 216(g) to compel continuance of a joint traffic arrangement which it could not have initially required, even though discontinuance of the arrangement would impose upon shippers a combination of local rates higher than the joint rate theretofore applicable over the

discontinued through route. (See in the certified record the order of the Commission in *Riss, supra*, dated Nov. 29, 1946.) The Commission reached the same conclusion in two other cases cited on page 8 of our jurisdictional statement, *East South Joint Rates*, 44 M. C. C. 747 (1945), and *Southeast Shippers Assn.*, 54 M. C. C. 770 (1952).

One of the cases cited by the Government (p. 4), *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S. 658, 663 (1963), points out that the power to investigate and determine the validity of proposed rates was first conferred upon the Commission in 1906, and that the power to suspend rates during the investigation was given to the Commission in 1910. The amendment of 1910 added, *inter alia*, the following provision to § 15 of the Act:

> "At any hearing involving a rate increased . . . after the passage of this Act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier . . ." (36 Stat. 552).

It is obvious that that provision is the direct ancestor of § 216(g).

Thus, *Port of New York Authority, supra*, and the other decisions cited in our jurisdictional statement, page 11 and note 1, were decided in a statutory framework similar to that of the case at bar.

The cases cited by the Government (pp. 4-5) involved rates, which are initially and at all times subject to the jurisdiction of the Commission. No carrier may operate unless it files rate tariffs. But a carrier may operate without entering into optional honoring arrangements with another carrier, and without entering into other voluntary joint traffic arrangements. There is obviously a difference

between the ordinary regulation of rates and the attempted use of rate regulatory power to extend the Commission's jurisdiction over voluntary joint traffic arrangements which the Commission has no power to compel. The Commission had always held until the case at bar that its rate regulatory power did not authorize it to forbid carriers to discontinue a joint traffic arrangement with another carrier that the Commission could not have compelled initially. The Commission's long continued holding was in accord with the common law as explained in our jurisdictional statement, pages 15-18.

2. Referring for authority to the District Court's opinion, the Government says (p. 5) that the question of the Commission's power to preclude a carrier from withdrawing from an optional honoring arrangement "is discrete from the question of its power initially to compel such arrangement." It is highly significant that the only authority the Government can cite for that principle is the opinion that is here on appeal. All of the other cases that have considered this question are the other way; they hold that if a carrier cannot be compelled to enter into a joint traffic arrangement with another carrier, it cannot be compelled to continue such arrangement voluntarily made (J. S. pp. 6-16).

3. The Government (p. 6) attempts to distinguish the motor carrier cases upon which we rely (J. S. 7-9) by saying that they involved motor carriers of property as to which through route arrangements are voluntary under § 216(c), whereas under § 216(a) passenger motor carrier through routes may be compelled. That analysis is unsound. All appellees admit that optional honoring may not be initially compelled by the Commission. Thus, optional honoring is precisely similar to property motor carrier

through routes in that neither of these joint traffic arrangements may be compelled and therefore the Commission cannot forbid their discontinuance. It is significant in this connection that the Commission in its Report (J. S. pp. 25-34) did not claim that § 216(a) or any other statute empowers the Commission to compel institution of optional honoring arrangements.

4. M. K. & O. attempts to distinguish the cases upon which we rely in pages 6 to 12 of our jurisdictional statement by saying (pp. 8-9) that while the Act makes it plain that the motor carrier and railroad through route arrangements considered in those cases should be voluntary, "the statutory language carves out no such exception for ticket honoring arrangements." That reasoning is unsound. The important consideration is that the Act does not give the Commission power to compel carriers to enter into optional honoring arrangements. It is therefore unnecessary for the Act to "carve out" an exception. In the silence of Congress the matter of optional honoring arrangements is left to the common law (J. S. pp. 15-18), and the situation is the same as if the Act had affirmatively stated that such arrangements should be voluntary.

5. The Government (p. 6) and M. K. & O. (p. 10) cite *Baltimore & Ohio R. R. Co.* v. *Hamburger*, 155 Fed. 849 (E. D. Va. 1907). That case involved a rule limiting or preventing the transfer of a ticket from the purchaser to another person. It involved only the issuing carrier. It did not have anything to do with arrangements between two carriers, whereas in the case at bar the dispositive issues are entirely concerned with joint traffic arrangements between carriers. There is a wide difference between the two situations.

6. M. K. & O. argues (p. 9) that the Commission has been vested with discretionary powers broad enough to justify its order. That contention is without merit. Discretionary powers must rest on some statutory foundation. The Commission has no jurisdiction over any joint traffic arrangements between carriers in the absence of statutes conferring that jurisdiction (J. S. 15-18). The Commission's order in *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612 (1945), cited by M. K. & O. (p. 9), rested on a solid foundation of statutes giving the Commission power to compel railroads to enter into through route-joint rate arrangements with water carriers. There is no statutory foundation for compulsory optional honoring arrangements.

7. Finally, to affirm the District Court's judgment would be to upset fifty years of highly important precedent upon which carriers have come to depend. As the cases we cite indicate, carriers for many years have been going into voluntary joint traffic arrangements with other carriers in the expectation that they could withdraw at will. A probable result of affirmance would be the trapping of a huge number of carriers, to their surprise and dismay, in voluntary joint traffic arrangements from which they can escape only by the Commission's leave. Another result would be to deter carriers from entering into future arrangements of that kind. In view of the long course of Commission and judicial decision which is opposed to the Commission's order (J. S. pp. 6-18), and in consideration of the importance of the case to the transportation industry, plenary consideration is warranted.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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